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91-1580 & 91-1664

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

OSGOOD TOWER and MARCIA P. DYKES,
Petitioners,

v.

NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION, ET AL.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION OF RESPONDENT NORTHERN VIRGINIA TRANSPORTATION DISTRICT COMMISSION

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QUESTIONS PRESENTED

1. Whether a state supreme court's construction of the debt provisions of its constitution raise federal questions permitting review by this Court.

2. Whether rules of a state supreme court pertaining to its process for considering a case upon rehearing raise federal questions or otherwise warrant this Court's review under Rule 10, Rules of the Supreme Court of the United States.

PARTIES

The Northern Virginia Transportation District Commission was the plaintiff in the trial court and appellee in the Supreme Court of Virginia.

The Board of Supervisors of Fairfax County was an intervenor-plaintiff aligned with the Commission in the trial court and an appellee in the Supreme Court of Virginia.

Marcia P. Dykes and Osgood Tower were defendants in the trial court and appellants in the Supreme Court of Virginia.

Dykes and Tower have filed separate petitions for writs of certiorari in this Court.

TABLE OF CONTENTS

Page No.

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES v

DECISION BELOW 1

JURISDICTION 1

PROVISIONS OF LAW 2

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 5

ARGUMENT 6

1. The Question Whether The Proposed Bonds Are Valid Concerns Only State Law And Does Not Constitute A Federal Question 6

2. The Questions Pertaining To The Virginia Court's Rehearing Process Do Not Warrant Review Under Rule 10 7

CONCLUSION 9

CERTIFICATE 9

TABLE OF AUTHORITIES

Page No.

Cases

Dykes v. Northern Virginia Transportation District Commission, 242 Va. 357, 411 S.E. 2d 1 (1991) 1

Mathews v. Eldridge, 424 U.S. 319, 333 (1976) 8

Murdock v. City of Memphis, 87 U.S. (20 Wall) 590 (1873) 6

Constitution and Statutes

Title 28 § 1257 6

Va. Const. Art. VII § 10(b) 2, 6

Virginia Code Annotated, § 8.01-675.2 3

Rules of Court

Rule 5:39, Rules of the Supreme Court of Virginia . . . 3

Rule 10, Rules of the Supreme Court of the United States . . . . . i, 6, 7

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DECISION BELOW

The decision of the Supreme Court of Virginia is reported as Dykes v. Northern Virginia Transportation District Commission, 242 Va. 357, 411 S.E. 2d 1 (1991).

JURISDICTION

The Northern Virginia Transportation District Commission and the Board of Supervisors of Fairfax County initiated this case to determine whether a proposed bond issue met certain requirements of the

Constitution of Virginia. The trial court granted relief to the Commission and to the Board and validated the bonds. Dykes and Tower, defendants at trial, appealed to the Supreme Court of Virginia which granted writs to review the trial court's decision.

In a decision dated April 19, 1991, the Supreme Court, by a 5-1 majority with one Justice concurring in the result, reversed the decision of the trial court.

In June, 1991, the Supreme Court granted petitions for rehearing and withdrew its April opinion and judgment. The Court heard new argument in September, 1991. On November 8, 1991, the Supreme Court handed down a new decision in which the Court, by a 4-3 majority, affirmed the judgment of the trial court below validating the bonds as constitutional under the Virginia Constitution.

On January 10, 1992, the Supreme Court denied Dykes and Tower's petitions for rehearing. On April 3, 1992, the Supreme Court denied Dykes and Tower's motions to vacate the Court's November 8, 1991 decision.

PROVISIONS OF LAW

Constitution of Virginia: Art. VII § 10(b)

> No debt shall be contracted by or on behalf of any county or district thereof or by or on behalf of any regional government or district thereof except by authority conferred by the General Assembly by general law. The General Assembly shall not authorize any such debt except the classes described in paragraphs (1) and (3) of subsection (a), refunding bonds, and bonds issued, with the consent of the school board and the governing

> body of the country, by or on behalf of a county or district thereof for capital projects for school purposes and sold to the Literary Fund, the Virginia Supplemental Retirement System, or other State agency prescribed by law, unless in the general law authorizing the same, provision be made for submission to the qualified voters of the country or district thereof or the region or district thereof, as the case may be, for approval or rejection by a majority vote of the qualified voters voting in an election on the question of contracting such debt. Such approval shall be a prerequisite to contracting such debt.

Statute: Sec. 8.01-675.2 of the Code of Virginia (in pertinent part):

> The Supreme Court, on the petition of a party, shall rehear and review any case decided by such court if one of the justices who decides the case adversely to the petitioner certifies that in his opinion there is good cause for such rehearing.

Rule: Rule 5:39, Rules of the Supreme Court of Virginia (in pertinent part):

> (d) No petition for rehearing shall be allowed unless one of the justices who decided the case adversely to the applicant is of opinion that there is good cause for such rehearing. The proceedings upon such rehearing shall be in accordance with § 8.01-675.2 of the Code. No oral argument will be permitted on applications for rehearing.

(e) When a rehearing is granted, the case will be placed on the privileged docket for oral argument. The petitioner may not file any brief in addition to the petition for rehearing. The respondent may file in the office of the clerk of this Court 20 copies of the brief in reply to the petition and shall deliver or mail 3 copies to opposing counsel. Such brief in reply shall not exceed 15 typed or printed copies in length and shall be filed within 21 days after the date of the order granting the rehearing. The respondent will be heard orally whether or not he filed such brief. The case will be called at the next session of the Court after the expiration of the 21 days unless counsel agree that it be called at a session of the Court commencing at an earlier time.

STATEMENT OF THE CASE

This case arises out of the efforts of two citizens to block a proposed bond issue as allegedly invalid under the Virginia Constitution because the Board did not first submit the proposal to the voters in a referendum.

After the trial court validated the proposed bonds under the Virginia Constitution, the two citizens appealed to the Supreme Court of Virginia. Initially, the Supreme Court reversed the trial court.

Because of the far reaching implications of the majority opinion, the Commission and the Board, with the support of numerous amici, petitioned for rehearing. By Order dated June 4, 1991, the Supreme Court ordered that its April judgments "be set aside, the opinion rendered April 19, 1991, be withdrawn and a rehearing granted." See Dyke's Appendix B, p. 19a-20a. The

Court's decision to grant rehearing was made at a conference of the Justices where a Justice orally "certified" that rehearing should be granted. According to the Clerk of the Court, writing on behalf of the Court, this procedure complies with the Virginia requirements. See Dyke's Appendix E, p. 25a.

In September, the Court heard new argument and, by decision dated November 8, 1991, affirmed the trial court and validated the bonds under Virginia law. Thereafter, the Court denied motions to set aside the November opinion.

At the first hearing resulting in the April decision, the sitting Justices of the Supreme Court participated with the exception of Justice Hassell, who had been a partner in one of the firms appearing before the Court, and Justice Compton, who was ill. A Senior Justice and a retired Justice sat in their places. On rehearing in September, the same Senior Justice continued to sit in place of Justice Hassell, but Justice Compton resumed his seat as a regular, sitting Justice. Justice Keenan replaced Justice Russell who had retired during the interim.

SUMMARY OF ARGUMENT

Petitioners seek this Court's review of the Virginia Court's determination that a proposed bond issue does not constitute debt as defined in the Virginia Constitution. Because the ultimate decision was made on rehearing, petitioners also seek this Court's review of the internal procedures followed by the Supreme Court of Virginia pertaining to rehearings in that Court.

These state questions do not satisfy the federal jurisdictional requirements for considering petitions and they fall woefully short of meeting the requirements of

Rule 10, Rules of the Supreme Court of the United States. The petitions should be denied.

ARGUMENT

-1-

THE QUESTION WHETHER THE PROPOSED BONDS ARE VALID CONCERNS ONLY STATE LAW AND DOES NOT CONSTITUTE A FEDERAL QUESTION

Petitioner Tower asks this Court to review the opinion of the Supreme Court of Virginia on the question of whether a proposed Fairfax County bond issue constituted "debt" as that term is used in Art. VII, § 10(b) of the Constitution of Virginia.[1] That question concerns only state law.

Whether phrased in terms of Title 28 § 1257; Rule 10, Rules of the Supreme Court of the United States; comity; federalism; or independent state grounds, there is no basis for this Court to review the decision of the Supreme Court of Virginia which pertained solely to state law. Accordingly, respondent submits that this Court is without jurisdiction or constitutional authority to review this issue. Murdock v. City of Memphis, 87 U.S. (20 Wall) 590 (1873).

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[1]It is not surprising that Tower concentrates on this issue. At argument on rehearing before the Supreme Court of Virginia, Tower, then represented by Mr. Goldbecker who now serves as counsel to Marcia Dykes, waived all other assignments of error. See Dykes' appendix 16a.

THE QUESTIONS PERTAINING TO THE VIRGINIA COURT'S REHEARING PROCESS DO NOT WARRANT REVIEW UNDER RULE 10

Petitioner Dykes argues that certain internal procedures of the Supreme Court of Virginia pertaining to its rehearing process violate due process. These procedures include: (1) treating the case de novo on rehearing; (2) granting a rehearing for reasons Dykes deems unacceptable; (3) permitting regularly sitting Justices who did not initially sit to sit on rehearing; (4) failure of the Justice voting to grant rehearing to so "certify" in writing; and (5) inability under the Virginia Rules to be able to file a brief in opposition before the Supreme Court acts on the petition for rehearing.

Reasons (1) through (4) concern only state questions and do not raise due process considerations.

1. When a court withdraws its opinion and sets aside its judgment and grants a rehearing, it follows that the rehearing will be de novo. Even if the petitioners here initially misunderstood the process, because the question before the Virginia court was solely a question of law, the only effect was which side would first present oral argument on rehearing. There was no prejudice. In fact, they retained the strategic advantage of rebuttal argument.

2. The Virginia Court is not required to articulate reasons for granting a writ or a rehearing. Even accepting as true that the reasons were not of the type for typically granting rehearing as described by a Justice in a continuing legal

education program, that does not constitute a due process violation warranting review by this Court. It was a matter solely within the discretion of the Supreme Court of Virginia.

3. The method used by a state court to determine whether regular sitting justices will sit in any particular case does not create a federal question.

4. The determination by a state supreme court that its action complies with the procedural requirement of a state statute does not create a federal question, particularly when the state question is whether an oral statement satisfies a statutory reference to "certify."

Reason (5), while described in the context of due process, does not give rise to a legitimate federal question because Dykes was given the opportunity to brief the case prior to the second argument and to participate in that argument.[2] The fundamental requirement of due process is the right to be heard at a meaningful time and in a meaningful manner. Mathews v. Eldridge, 424 U.S. 319, 333 (1976). Dykes' opportunity to present her case, both by brief and argument of counsel, before the dispositive November 8, 1991 opinion was rendered fulfills all due process requirements.

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[2]In fact, petitioners took advantage of three opportunities to brief and orally argue the case in the Supreme Court of Virginia -- first at the petition stage, second at the initial argument before the full court, and third at the rehearing argument.

CONCLUSION

For the foregoing reasons, the Northern Virginia Transportation District Commission requests that this Court deny the petitions.

Respectfully submitted,
Northern Virginia Transportation District Commission

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CERTIFICATE

I hereby certify that this 5th day of May, 1992, we filed forty copies of this Brief of the Respondent Northern Virginia Transportation District Commission in the Clerk's Office and mailed three copies of it to Frederick H. Goldbecker, Esquire, P. O. Box 517, Fairfax, Virginia 22030, counsel for Marcia P. Dykes; Osgood Tower, pro se, 4200 Pineridge Drive, Annandale, Virginia 22003; and Robert Lyndon Howell, Esquire, Acting County Attorney, 4100 Chain Bridge Road, Fairfax, Virginia 22030, counsel for Board of Supervisors of Fairfax County, Virginia.

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